Spencer, Samuel
The railways

THE RAILWAYS:

THEIR RELATIONS TO THE GOVERNMENT

ADDRESS

OF

SAMUEL SPENCER

BEFORE

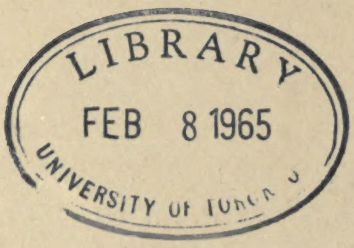
THE TRAFFIC CLUB OF PITTSBURG

APRIL 7, 1905

"There is no liberty if the power of judging be not separated from the legislative and executive powers."—MONTESQUIEU

"Agriculture, Manufactures, Commerce and Navigation, the four pillars of our national prosperity, are the most thriving when left most free to individual enterprise."—THOMAS JEFFERSON

"It must not be forgotten that our railways are the arteries through which the commercial lifeblood of this nation flows. Nothing could be more foolish than the enactment of legislation which would unnecessarily interfere with the development and operation of these commercial agencies."—PRESIDENT ROOSEVELT'S MESSAGE TO CONGRESS, December 3, 1901



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OF

SAMUEL SPENCER

BEFORE THE TRAFFIC CLUB, PITTSBURG, PA.

APRIL 7, 1905

Mr. President, Members of the
Traffic Club and Fellow Guests:

The distinguished jurist who is your guest to-night said on a previous occasion: "The railroad man has his hour of opportunity now. Let him join our President in establishing a tribunal through which the nation's power can be honestly, but at all times promptly and adequately, exercised. That will bring peace with justice. No other peace would last."

At no time has the President's intention been to advocate Governmental regulation of railways which would inflict injury upon the investments in the properties or impair the usefulness of the carriers to the public. He has never advocated, and he can be trusted never to advocate, the adoption of any regulation which does violence to the fundamental principles on which the Government is founded.

If a tribunal which will answer the description can be organized, or if methods can be found—and I believe they can be without the necessity of an additional and special tribunal for the purpose--by which the great railway questions of the day can be settled in accordance with law and equity, and in accordance with those fundamental principles of government which are guaranteed by the Constitution, I speak with authority when I say that substantially every railway manager in the country will subscribe to that view, and aid in the accomplishment of the desired results.

The difficulties of adjustment, therefore, lie not, as has been so often claimed, in any obstructive or defiant attitude of the

railway manager. They rest fundamentally in the anomalous condition in which the carriers are placed under the law; in those suggestions of remedy which, failing utterly to reach the evils sought to be cured, would punish unwisely and unnecessarily the innocent along with the guilty; and in those suggestions which look to the separation of one particular class of property from all others, to be dealt with invidiously by special tribunal and by special methods.

It is not reasonable regulation to which the carriers object, it is to unwise and unfair regulation. It is not the regulation which seeks directly to remedy known and tangible evils, but it is the so-called regulation which, while ostensibly attacking one evil, or class of evils, inflicts unknown and unjustifiable injuries upon those who are not offenders; and that which undertakes unnecessarily to interfere with the legal and beneficial freedom of commercial action and enterprise, and thus to diminish the future usefulness of the carriers, and impede the material development of the resources of the country. It is not the regulation which improves, but it is the regulation which confuses and retards.

The term "regulation" is so broad that it has been made to include almost every device for dealing with commerce or with the carriers. It embraces, however, two main features, which, if justice is to prevail, must always be considered and treated separately.

Rebates and secret contracts, extortions and unjust discriminations are crimes under the law, and, as such, call for punishment through the courts, not the exercise of discretion by a non-judicial body.

The regulation or control by Government of the charges of carriers for services performed is an entirely separate and distinct matter, and involves considerations of business judgment and experience; the rights of property as well as the rights of the people; and of that discretion in the management of property which should always be left with the owner so long as its use is consistent with law and equity.

It is in respect to this phase of regulation that a wide departure from reasonable safeguards, if not from the fundamental principles of Government seems to be threatened, and against which the carriers have made protest.

The President, in his message to Congress in December, announced in no uncertain terms that "the rebate, the secret contract, the private discrimination, must go," and that "the highways of commerce must be kept open to all on equal terms." The country as a whole, including the owners and the managers of railway properties, zealously supports him in this declaration of purpose. When the Elkins law was passed, it is well known that not a single carrier in the country raised the slightest objection, and not one objects now to any provision of law which will aid in accomplishing this declared purpose of the President.

But the Townsend bill, which passed the House of Representatives at the last session, contained not a single provision for dealing with these or kindred abuses, nor was any bill presented or suggested which could be construed as having that most desirable end in view.

The President's specific recommendation that the Commission be vested with power, where a given rate has been challenged and found to be unreasonable, to decide, subject to judicial review, what rate shall take its place, and to put that rate into effect, was most wisely qualified by the statement that "at present it would be undesirable, if it were not impracticable, to finally clothe the Commission with general authority to fix railroad rates."

And yet substantially every bill which has been presented in Congress, looking to granting increased powers to the Commission, has been so drawn that the ultimate and necessary effect of its provisions, if enacted into law, would be to "finally clothe the Commission with that general authority" which the President, in his conservatism, pronounces "undesirable, if it were not impracticable."

Such enactments would not be "regulation." They would mean incipient, if not final, control of the sources of revenue of all the carriers, and that, it is safe to say, the President never intended.

They might easily mean the taking of property or the diminution of its value without due process of law, or without compensation to the owners.

The effect of such regulation undoubtedly would be the curtailment of future railway construction and improvements,

not only by reason of the impairment of railway credit, but also from the unwillingness of investors to own or to enlarge properties, the revenues of which would be practically under Governmental or political control and the expenses still be subject to the uncertainties of industrial conditions.

The railways of this country are chartered and exist to perform certain public services, and they represent, with a few isolated exceptions, the investment of private capital.

The relations of the carriers to the Government assume, therefore, the dual character of those of public servants upon the one hand, and, upon the other, that of property of enormous cost, entitled, like all other property and equally with it, to Governmental protection.

The railways are public carriers for hire, entitled to just and reasonable compensation for services performed. Railway charges are not, as it has been sometimes erroneously asserted, a tax upon the public or upon the individuals or industries or commerce served by the carriers. A tax is a levy placed upon all for the support of the Government, and from the payment of which no citizen is or should be exempt. The railway charge is paid only by those who voluntarily use the facilities which have been provided at the cost of others.

The railway system of the country has become so vast, and the volume of interstate traffic so enormous in comparison with the intrastate, that the relations between these carriers and the general Government now overshadow in the public mind those between the carriers and the States from which the charter rights are derived.

The rapid growth of the railway system from 35,000 miles in 1865 to 212,000 miles in 1905 was a necessary accompaniment, if not the chief means of promoting the marvelous development of industry and population and wealth which have marked that period.

The demand for Federal regulation had its first formal manifestation in the enactment in 1887 of the Act to Regulate Commerce, under which the Interstate Commerce Commission was appointed, with its new, its complex, and its anomalous powers.

The chief purposes of the Act were to suppress rebates and unjust discriminations between individuals, localities and

classes of traffic, and to provide, through the appointment of a Commission, for the detection and eradication of such abuses, and for the prosecution and punishment of those found guilty of violating the statute.

Under the provisions of the Act much good has been accomplished. Despite occasional but persistent statements to the contrary, the evil of rebates, secret contracts, and unjust discriminations has almost entirely disappeared.

The great volume of traffic throughout the country moves under published tariffs, accessible to all. Reports of operations of all the carriers subject to the Act, and statements of their finances, are made from a uniform standpoint, and are published to the world.

For eighteen years, since the appointment of the Commission, 90 per cent. of all of the complaints which have been made to it by the public against the carriers have been adjusted without even formal hearing. Of the remaining 10 per cent. which have been the subject matter of formal findings by the Commission, four-fifths of the findings have been acquiesced in by the carriers, leaving only one-fifth of 10 per cent., that is, 2 per cent. of the total complaints, to be litigated between the Commission, or the complainants, and the carriers.

None can claim that this does not mark wholesome and far-reaching progress in the regulation of railway transportation. Perfect results can never be obtained. Gratifying as those are which have been secured, they might have been far greater if certain manifest defects in the law had either been avoided or corrected, and if the efforts of the Commission had been directed more specifically to the curing of the evils for which it was appointed, instead of endeavoring to secure powers which it was never intended to exercise and which are incompatible with its existing functions.

With the revival of industrial and commercial activity in 1897 the railways were congested by the increased volume of traffic for which they could not be suddenly prepared. The available facilities were inadequate for the demands of the public. Delays and claims and losses were incurred. These and other potent influences served to revive the clamor against the carriers, and this was soon reflected in political campaigns,

upon the hustings, and in legislative halls. The clamor was largely indiscriminate and misguided. The existence of evil was in many cases more assumed than real. Numerous remedies were suggested, but all took the form of that perennial cure for modern maladies—additional legislation.

The cry arose that "something must be done," but there was a woeful lack of searching thought of what that something should be.

Rebates and secret and unjustly discriminatory devices were justly denounced, but with no show of increased vigor in the application of those means already provided for their suppression.

With numerous bills pending in Congress variously devised for the regulation of railways, but nearly all carrying that insidious feature always so skillfully injected, granting to the Commission power to make rates, there was finally evolved and passed at the close of the 57th Congress, the wise and effective measures known as the Elkins Law. It was aimed directly at the real evils, and went straight to the mark. It was hailed with satisfaction by the administration, by the public, and by the railway managers, and it has indirectly accomplished a large measure of success, but its possibilities for good have not only not been exhausted, but have scarcely been entered upon.

Nevertheless, the question of additional legislation has again become acute before the public and in Congress, and this acuteness has been enormously emphasized by misinterpretations of the recommendations of the President.

In response, advocates of increased power for the Commission have returned to the attack with renewed vigor, armed chiefly with the same old ammunition of abusive criticism and garbled statistics and inflammatory generalities, appealing to popular prejudice.

It is charged that rates are extortionate and must be lowered, and yet the rates in this country are only from one-half to one-third of those in countries with which the producers of the United States must compete in the markets of the world, and wages of railway employees are 50 per cent. higher than the highest elsewhere, and in eighteen years the Interstate Commerce Commission has not succeeded in establishing in the courts a single case of rates unreasonable in themselves.

The fact that the average rate per ton-mile for the entire tonnage of the United States rose less than four-tenths of a mill from 1899 to 1903, is paraded as evidence of extortion, but the fact that the average rate for all tonnage does not necessarily mean increased tariff rates is adroitly not mentioned, nor is the fact that even the average rate in 1903 was less than it was during the depressed years of 1894, 1895 and 1896, and was 19 per cent. lower than it was in 1890, 38 per cent. lower than it was in 1880, and 60 per cent. lower than it was in 1870. The all-important fact is also studiously ignored that from 1899 to 1903 the cost of railway labor rose twelve or fifteen per cent., the price of materials consumed in railway operation increased twenty-five or thirty per cent., while even the nominal average rate, which may mean so little, increased less than seven per cent.

Thus, on a partial and one-sided statement, the shout is raised that the country's welfare in agriculture, in industry and in commerce is threatened by railway rapacity, but the indictment fails when confronted with the facts and in the light of the prosperity and growth of industry and wealth within that period in every State and every city and every village in this broad land—a prosperity and growth unparalleled in the history of the industrial world.

When the charge of rate extortion *per se* fails, the cry is raised that rates are unreasonable and unjustly discriminatory between localities. Again the records of the Commission illumine the misty statements which are promulgated to the public.

In the eighteen years of its history, the Commission's condemnations of rates relatively unreasonable between localities, not acquiesced in by the carriers, have been at the rate of only two cases per annum, out of the almost innumerable rates in effect, the number and complexity of which are indicated by the fact that an average of 130,000 tariffs per annum have been filed with the Commission by the carriers during that period. Out of the average of less than two cases per annum, or thirty-five cases in eighteen years, the judgment of the Commission has been reversed by the courts in all cases but two.

The Townsend Bill provided that a rate once fixed by the Commission should continue in force indefinitely, unless changed

by the Commission or by the Court. Under such law all rates would, in time, become Commission's rates, and the functions of railway managers in adjusting rates to meet commercial conditions, and in extending the sphere of usefulness of the transportation system of the country, would step by step come to an end. Slow, but steady, paralysis would creep into the industrial arteries through which the blood of commerce flows, and the transportation system would gradually become numb and rigid. The present activities of railway managers would be eliminated as an agency in the intelligent development of the resources of the country. Rates would soon be machine-made only, and commercial and industrial centers, now acknowledging no bounds for the ultimate distribution of their products, would find themselves operating in narrower and narrower zones, finally circumscribed by governmental edicts as to where their wares should go.

The annulment of a rate, as provided for in the Townsend Bill, upon the Commission's decision that it was unreasonable or unjust, and the making of that rate effective prior to review, would be to give to the findings of the Commission the force of the judgment of a court. If rates are unjust or unreasonable, they are illegal, but punishment for their illegality should not in fairness or in law be inflicted in the form of reduction or otherwise until a court of competent jurisdiction shall have passed upon the question. The right of review by court is inherent, and cannot be denied, but the carrier is not fully protected in that right if penalty be inflicted pending the review.

To also authorize the Commission to name in substitution a new rate and to enforce it, is to lodge, in the same tribunal which has acted as a court, an additional power which is purely legislative.

Congress, after prolonged investigation and extended debate, carefully and wisely avoided in the Act to Regulate Commerce the delegation of these mixed and dangerous powers to one body, and it would be wholly antagonistic to the principles of our Government thus to unite them, and it would add to the injustice to have the force of the combination directed solely towards the regulation or control of one class of property.

The assertion that the power sought by the Commission, and

provided for in the Townsend Bill, does not include the right to initiate rates or to make tariffs, but merely after complaint and hearing to correct an unjust and unreasonable rate, is specious and misguiding. The condition precedent of a complaint amounts to nothing. Complaints can always be had with or without the bidding, and with the power to fix a rate lodged in a body not responsible to the owners of the property, complaints will soon be more numerous than the locusts of Egypt. The right to name one rate is the right to name a thousand, and in the end will be the right to name all. In the famous Maximum Rate case, where the Commission claimed the power now sought to be conferred, it did actually in one order name and attempt to enforce several thousand rates.

One reason assigned for granting specific rate-making powers to the Commission, is that of long delays incurred in reaching conclusions between the carriers and the public. I again revert to the potent fact that 90 per cent. of all of the complaints which have been made by the Commission have been adjusted without the formality of a hearing. It is easily susceptible of proof that the chief delays in the remainder are delays in the hearings and in the findings of the Commission. The delays in the Courts are only those which necessarily belong to the safe and orderly administration of justice.

One of the chief purposes, and what should be one of the chief results of the Elkins Law of 1903, is expedition in all court proceedings instituted by or on behalf of the Commission against the carriers, and yet the significant fact stands out that there has been no indictment, no prosecution of a single individual or of a single corporation under the terms of that Act now in force for more than two years. If the passage of that law, with its drastic remedies, and its almost summary methods of procedure, does not expedite the trial of offenders against the Interstate Commerce Law, what can be the effect of any additional legislation for similar ends?

The delays complained of are added to, however, by the numerous and complex and sometimes conflicting duties performed by the Commission. It is a statistical bureau, an investigator, a prosecutor; it performs quasi-judicial functions in hearing complaints, and in the approval or condemnation of rates; it is charged with the supervision of the equipment of

the railways in respect to safety appliances, and it is its duty to collect and classify information in respect to railway accidents. It has voluntarily assumed the position of an advisory board in respect to the broad and grave questions of differentials between Atlantic ports, and while instructed by the Act under which it serves to make practical recommendations to Congress as to additional legislation needed for the regulation of the railways, some of its members have apparently considered it their duty to impress upon the public from time to time their views as to the necessity for enlarged powers and thus to promote a public sentiment in favor of such powers, and such efforts have not at all times been free from expressions avowedly inimical to the carriers. Under these conditions it would be little short of marvelous if the machinery of the Commission did not move slowly, if its docket were not clogged, and if there were not a feeling that the interests of the public were suffering undue delays.

Lastly and persistently comes the well-worn cry of rebates, secret contracts and unjust discriminations in the interests of the favored few. The Chairman of the Interstate Commerce Commission in 1903 stated before a committee of the Senate that rebates had practically ceased to exist. Rebates and all secret devices for discrimination were as definitely condemned by the Act of 1887 as it is possible to condemn them. Severe penalties of fine and imprisonment were imposed, but not a single imprisonment has ever occurred, and you can count the fines upon the fingers of one hand. The Elkins Law of 1903 strengthened the hands of the Commission against such practices to an extent that the Commission itself has stated that in respect to this phase of regulation the law was all that could be asked.

Yet, in the two years since its passage, the Commission has not once taken advantage of the great powers under that law.

The Commission in its creation was an anomalous tribunal. It has the power to investigate and to prosecute, and yet is not an attorney. It has the power which, under common as well as statute law, is judicial, to condemn a rate or a practice adjudged to be unreasonable or unjust, and yet is not a court. It went beyond its powers and claimed, because it was authorized and required to condemn unjust and unreasonable rates,

that inferentially it had the power, which is legislative, to name a future rate in substitution, and yet it belongs not to the legislative branch of the Government.

It has sought to have its finding made self-executing, and has even claimed that it exercised such powers for ten years, and yet it is not included in the Executive Department.

Small wonder under these conditions that it has not accomplished all the good for which the public hoped.

Because the carriers have not accepted all its edicts, but have on occasion availed themselves of their inherent rights to appeal to the courts for protection, they have been charged with an arrogant resistance to authority, and yet the records show that in over 90 per cent. of such appeals the findings of the Commission have been reversed.

In many respects the Act itself was inadequate for its intended purposes.

It was intended to do away with all rebates and unjust discriminations and to secure rates uniform to all similarly circumstanced, and yet water lines, in many cases participants in the identical traffic for which the rail carriers compete, are exempt from its provisions.

A large volume of the interstate traffic in respect to which rebates had flourished, was and is handled by lines partly within the United States and partly within the boundaries of foreign countries, and yet no provision was made which would protect the rail carriers within the States against the unfair, the illegal, and the demoralizing practices of the foreign component parts of such lines.

It has been adjudged that the express companies doing an interstate traffic, competitive to an extent with the railways, and moved over their lines, are exempt from the provisions of the law.

Fast freight lines and private car lines are doing on their own account, or through their agencies, an interstate traffic in many cases highly competitive with the carriers which are subject to the Act, and yet no steps have been taken to hold such lines amenable to those restrictions which are imposed upon such carriers.

Thus, while rebates and unjust discriminations were condemned, gaping loopholes were left in the legal fabric for the

continuance of such practices. Under these conditions it could scarcely be expected that the operations of the law would be completely satisfactory.

The English Government's method of railway regulation, and its supervision over railway rates and charges, have often been referred to as furnishing a precedent for the enlargement of the powers of the Interstate Commerce Commission.

A parallel between the powers and duties of the Railway and Canal Commission of England and the Interstate Commerce Commission of the United States will serve admirably to illustrate the wide divergence in principle upon which railway regulation is provided for in the two countries. The Railway and Canal Commission consists of five members, two appointed upon the recommendation of the President of the Board of Trade, one of whom must be experienced in railway business, and both hold office for life or during good behavior, and three *ex-officio* members who must be Judges of the Superior Court. The Commission is a duly constituted court of record, and not less than three Commissioners shall attend at the hearing of any case, one of the *ex-officio* or judicial members presiding.

The Commission thus constituted, and as a court of record, is peculiarly fitted to deal conservatively and impartially with the issues presented to it. It has no duties liable to impair its judicial character.

It cannot originate complaints, or proceed upon its own motion; it is not charged with the duty of inquiring into the management of railways, and it has no administrative supervision over any of the details of railway operation. It is not charged with the duty of detecting violations of law or of bringing about prosecutions for such violations. Contrast this with the short tenure of office and the varied functions of the Interstate Commerce Commission, its inquisitorial powers for detecting violations of law, its power to institute complaints in its own name, and to cause prosecutions to be instituted in the courts, and its authority and duty to enforce certain provisions of the law, and the fundamental distinction between the English method and the present American method becomes glaringly apparent.

Notwithstanding the superior judicial position occupied by

the Railway and Canal Commission of England, an appeal lies from its decisions on all questions of law.

With all its judicial powers, and all the safeguards of long training and life tenure, the English Commission has no power to revise the rate schedules and classifications of the English carriers. Its functions are confined to the adjustment of complaints within the limits of rates and classifications prescribed by Parliament.

The simple, direct, equitable and effective method of dealing with the grave questions now at issue seems to me to be this:

If further legislation be necessary—and I do not say that it is not—let it be given the direction pointed out by the evils calling for correction, and along logical, not experimental, lines for the remedying of those evils.

Draw the distinction broadly and unmistakably between punishment for crime or misdemeanor, on the one hand, and the unnecessary and unwise Governmental or paternal interference with legitimate and legal exercise of individual endeavor, on the other.

Separate widely the functions of Government which detect, and arraign and prosecute, from those which sit in judgment upon complaints and offences against the law.

Strengthen the laws in condemnation of rebates, secret devices and unjust discriminations to any extent that may be found possible, and provide, if such further provision still be necessary, for the prompt arraignment and prosecution of all offenders of the law in the duly constituted courts of the country, and for the unsparing punishment of those who are found to be guilty. If there are such offenders in the railway fraternity, their offences should be exposed and punished, but it is un-American and unfair, not to say outrageous, because it is alleged there are such, that every manager, and every president and director, shall be subject to indiscriminate public condemnation, and that the innocent investors shall have their property jeopardized, and their rights infringed, because those to whom the prosecution of the law is entrusted fail to find the offender, and to punish him.

Bring under the provisions of the Interstate Commerce Act, and the jurisdiction of the Commission, those water lines

which are engaged in interstate commerce in competition or in conjunction with the railways; place such restrictions upon the interstate traffic passing partly through foreign countries as will compel compliance with all the laws and regulations which apply to that moving solely within United States boundaries; spread the mantle of the law and of the Commission over the fast freight and private car lines doing interstate commerce, and institute, if needs be, such regulations in respect to industrial tracks and phantom railways as shall prevent such allowances to them as may breed insidious evasions of the law.

In a word—stop illegal abuses drastically, but avoid action which will affect savings put into railroads in good faith; avoid legislation which might impair service and efficiency and reduce the wages of our 1,300,000 employees, for to the wage earners alone among that number now go over half of the gross expenses of the American railways.

Thus far I have discussed the regulation of railways from the standpoint of practical operation, and under the provisions of law. I do not overlook the fact that, upon questions of policy, and within the limits of the Constitution, there is a tribunal which, under our free institutions, is the court of last resort. The carriers, as well as every other interest, must recognize that the great tribunal in which the final judgment on all such questions is made up, is public opinion, and to that opinion, when pronounced, the carriers, of course, will bow. All that they ask, but that, they have the right to expect, is that to that tribunal the case shall be thoroughly presented, and that they shall be fully and impartially heard; that the court of public opinion shall not sit hastily or passionately.

I for one have every confidence that when the great, complex and far-reaching question now being agitated shall be thoroughly understood in all its bearings—the experience of the past, its possibilities and its dangers for the future—that the verdict of that great jury, when delivered, will be just and fair, and under it the industries of this country will continue to flourish, and the interests of the public, and the interests of the carriers, will be equitably protected.